Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

KEITH WAI KEUNG NG,
also known as KEITH ENG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the facts of this case involve conduct by law enforcement that violated fundamental fairness, shocking to the universal sense of justice, and establish entrapment as a matter of law thus requiring reversal of petitioner's convictions?

TABLE OF CONTENTS

Page

Question Presented i

Table Of Authorities iii

Citation To The Opinion Below 1

Statement Of Jurisdiction 1

Constitutional Provision Involved 1

Statement Of The Case 1

Statement Of Facts 2

Reasons For Granting The Writ 10

1. This Court, Based On The Unique Facts Of This Case, Should Establish As A Rule Of Law That Entrapment As A Matter Of Law Is A Defense Of Constitutional Dimension 11

Conclusion 22

TABLE OF AUTHORITIES

Page

Federal Cases

Jacobson v. United States, 503 U.S. 540 (1992)..... 12

Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960)..... 10

Morales v. United States, 260 F.2d 939 (6th Cir. 1958).....20, 21

Olmstead v. United States, 277 U.S. 438 (1928)..... 21

Sherman v. United States, 356 U.S. 369 (1958).... 11, 13, 20

Sorrells v. United States, 287 U.S. 435 (1932) 11

United States v. Echols, 253 F. 862 (D.C. Tex. 1918) 20

United States v. Johnson, 855 F.2d 299 (6th Cir. 1988).....12, 13

United States v. Kaminski, 703 F.2d 1004 (7th Cir. 1983).....13, 14, 15

United States v. McLernon, 746 F.2d 1098 (6th Cir. 1984)..... 13

United States v. Reynosa-Ulloa, 548 F.2d 1329 (9th Cir. 1977) 15

Federal Statutes

18 U.S.C. § 1958..... 1, 13, 17

28 U.S.C. § 1254(1) 1

CITATION TO THE OPINION BELOW

The unreported opinion of the Court of Appeals for the Sixth Circuit is reprinted in the accompanying Appendix ("App.") at pages 1 through 20.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). The Sixth Circuit's opinion was filed on December 18, 2001. This Petition for Certiorari is being filed within 90 days of the Sixth Circuit's opinion as required by Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the deprivation of due process of law secured by the Fifth Amendment to the United States Constitution which provides in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

On June 30, 1999, an indictment was filed in the United States District Court for the Eastern District of Michigan, Southern Division of Detroit charging Petitioner, Keith Ng, with three counts of Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire in violation of 18 U.S.C. § 1958.

On July 29, 1999, Petitioner entered a plea of not guilty. Trial commenced before a jury in the courtroom of Honorable George Carem Steeh on March 20, 2000. The jury returned a guilty verdict on all three counts on March 23, 2000. The matter was referred to the probation department for a presentence investigation report.

A sentence of one hundred and twenty-one months in the custody of the United States Bureau of Prisons was journalized on September 11, 2000. Notice of Appeal was timely filed on September 20, 2000. The Sixth Circuit Court of Appeals affirmed Petitioner's convictions and sentence.

STATEMENT OF FACTS

Dr. So Tang, who was married to Hsin-Ming Tang, met Petitioner in 1980. Petitioner was a general contractor who built Dr. Tang's house and medical office in San Marino, California. In approximately 1988, Petitioner and the Tangs invested in a vineyard in Santa Maria, California. The Tangs' names were placed on the deed. Petitioner had an oral contract with the Tangs to guarantee his share. Petitioner moved to Santa Maria and ran the vineyard.

The Tangs had been talking about conveying the title to their children for over a year because Dr. Tang didn't have malpractice insurance and wanted to avoid the liability for him to practice medicine. It was also a Chinese tradition to pass their assets to their children. In 1996 Dr. Tang conveyed three properties to his son George. One of

the properties was the Santa Maria vineyard in Santa Barbara County. Petitioner was told that they would honor his 20 percent in the vineyard. George paid his parents one million dollars. He paid a monthly interest payment of approximately $6,000 on the note. August 1997, divorce pleadings were filed by Mrs. Tang. Dr. Tang filed a lawsuit[1] to have the properties conveyed back.

Sometime in 1997, Petitioner began to have a relationship with Mrs. Tang. They traveled to Detroit in 1997 to help her son George who was starting medical residency training there to get settled in a home. In July of 1998, they returned to Detroit. During this trip, Petitioner met George's neighbor, Larry Campbell.

Petitioner had an interest in antique watches because his brother collected them. Petitioner asked Mr. Campbell to take him around to antique and pawn shops in search of watches. While at a pawn shop, Mr. Campbell fortuitously encountered Don DeClercq, a former neighbor, and introduced Petitioner to him.

DeClercq ran a business of selling expensive watches out of his home and unknown to Petitioner, DeClercq was a man who had an extensive criminal background.[2] Petitioner arranged a time to meet with DeClercq. The following day, Mr. Campbell drove Petitioner to DeClercq's house in order to discuss watches.

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[1] In November 1998, the Government, after doing a search on Lexis-Nexis, became aware of lawsuits filed by So Tang.

[2] Unknown to both Parties at the time of trial, a week earlier, DeClercq had attempted to bribe a state police officer.

DeClercq had a briefcase containing hundreds of watches that he showed Petitioner. No purchase was made at this time. A second meeting was arranged. During the second meeting, DeClercq showed Petitioner around his home. He also showed him his Rolls Royce and a stack of pictures of naked women. DeClercq told Petitioner that the women come to his house.

Petitioner decided to purchase two watches, but DeClercq wanted to be paid in cash so Petitioner had to return in a couple of days to pay for them. When he returned, Petitioner paid $8,000 in cash for one watch and later purchased another watch with a check made out for cash for $4,000 dated July 25, 1998.

Petitioner went to DeClercq's to have him fix a Rolex watch. DeClercq showed him another watch that he would sell for $80,000. Then DeClercq took him to a neighbor's who was a millionaire. When they returned to DeClercq's home, he showed him the pictures of the women again and Petitioner told him he wasn't interested. Then DeClercq said he needed money to play golf, so he sold Petitioner a small microscope for $100 that he said was worth $200.

According to DeClercq, Petitioner told him that he was the owner of a vineyard that he had purchased 10 years earlier. DeClercq stated that Petitioner said he borrowed $250,000 from a gentleman to purchase the vineyard and had been paying $25,000 a year for 10 years. When Petitioner had attempted to settle the debt by offering to pay an additional $500,000 and call it even, the individual told him that it was worth much more now and wanted five million dollars to settle the account.

Petitioner told DeClercq that he wanted this person to go to Mexico and never return and he would pay as much as $100,000 for that to occur with a $50,000 down payment. DeClercq asked Petitioner if he wanted this man murdered. Petitioner said, "I just want him to go away. I don't, I want this problem to go away. I don't want to be bothered any longer by this individual." DeClercq told him he would look into it and give him an answer.

Petitioner's version of the above referenced conversation is markedly different. Petitioner stated that when he told DeClercq he owned a vineyard, DeClercq said he had friends from South America who had money to invest in Petitioner's business. Petitioner asked him what he meant by that. DeClercq explained the people from South America had millions of dollars. They would bring DeClercq money to invest into a legitimate business. Petitioner told DeClercq that he wasn't interested because he had his own problems. Petitioner said that he had a lawsuit pending as a result of a lien on the property and loans to pay.

DeClercq told Petitioner that he could fix his problem. He told Petitioner about Jimmy Hoffa disappearing. Petitioner asked him what he was talking about. DeClercq told him about a movie called the Mechanic and to rent a movie called the Jackal and then he would know what he was talking about. DeClercq knew somebody that looked like a priest who could make people disappear.

August 1998, DeClercq met with his attorney who was representing him in a case where he was being

prosecuted by the government for tax fraud and ex-felon in possession of a gun. DeClercq told his attorney about his conversation in July with Petitioner. DeClercq's attorney told him this might be the best thing that ever happened to him, to have someone come to him and want to have somebody killed. His attorney said he would contact the IRS officials and find out what was going on.

In the early part of October 1998, FBI Special Agent, Joseph Callahan, was advised that a defendant in a federal criminal case (DeClercq) had reported information that someone had approached him to conduct a contract murder.

October 27, 1998, Agent Callahan and Agent Manley of the IRS met with DeClercq regarding the conversations he had with Petitioner. DeClercq told Agent Manley that he thought if he cooperated it might reduce his criminal liability. In an effort to cooperate, DeClercq entered into a contractual relationship with the FBI and became a government agent. He agreed to be directed by the FBI and ask specific questions and to authorize the FBI to record telephone conversations with Petitioner and any meetings that might take place.

Pursuant to Government direction, the first telephone conversation was made on October 27, 1998. DeClercq was directed to ask Petitioner if he still had that problem and if he still wanted DeClercq to help him with it.

November 5, 1998, a call was placed to Petitioner in which the FBI directed DeClercq to ask Petitioner if he wanted to get together and have a meeting. It was

decided that they would meet in person. Petitioner was asked to bring a "packet" (information about the intended victim such as his name, photographs of him, his address and relatives).

December 14, 1998, a meeting between Petitioner and DeClercq took place at the Marriott Hotel. The FBI had directed DeClercq to secure a room and they installed video and audio equipment. Following the meeting, the FBI was still unable to establish who the intended victim was. They tried to determine who the intended victim was through a lawsuit in which Petitioner was involved.[3]

December 31, 1998, DeClercq made an unrecorded contact with Petitioner. DeClercq advised the FBI of this unrecorded contact.

In the following months (January, February, March, April and May), Petitioner still had not given DeClercq a name or photograph of the intended victim. As of January 1999, Petitioner and DeClercq had a meeting established. However, the FBI felt it would be prudent to obtain additional information on Petitioner and the intended victim. Therefore, they requested that the meeting be postponed.

In February, DeClercq sent a watch to Petitioner that he had lowered the price from $2,700 to $1,700. The watch was returned by Fed Ex.

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[3] DeClercq had initially advised the FBI that Petitioner was involved in a lawsuit with an individual. It was that individual that petitioner wanted to initiate the contract murder against.

DeClercq claimed Petitioner called him at his home in February 1999. This call, however, was not recorded. DeClercq testified that Petitioner said he was thinking about having somebody else commit the murder for a lower price. This information was then given to Agent Callahan. Another recorded call was placed to Petitioner. It was decided that Petitioner would get in touch with DeClercq after March 21, 1999. However, Petitioner did not contact him. Therefore, Agent Callahan and DeClercq called Petitioner about four times from March 21st to April 8th and were unable to contact Petitioner but left messages. The FBI decided the deal was off.

March 20 1999, DeClercq was arrested for theft and was being charged as a habitual criminal. After he was arrested, he had a conversation with Agent Callahan. DeClercq pled guilty to being a habitual criminal in November 1999, but the court in the state case was waiting to sentence him so his sentence could run concurrently with his federal case.

June of 1999, DeClercq traveled to Las Vegas for a watch show. In violation of his contract with the government, DeClercq placed another unauthorized call to Petitioner. DeClercq testified that Petitioner told him that he had paid someone $50,000, but that person just took his money.

June 14, 1999, DeClercq contacted Agent Callahan and reported his conversation with Petitioner. DeClercq told Agent Callahan that he asked Petitioner if he still wanted him to take care of the problem and that they had renegotiated a price of $30,000 with a $5,000 down

payment. Agent Callahan directed DeClercq to call Petitioner and rehash that conversation in order to corroborate that information. June 14, 1999, a monitored phone call from DeClercq to Petitioner was placed.

June 16, 1999, a second call was placed in order to arrange a meeting with Petitioner. The meeting was initially scheduled to occur on June 22, 1999.

Agent Callahan accompanied DeClercq to Los Angeles. Upon arrival, an unrecorded phone call was placed from DeClercq's cell phone to Petitioner's cell phone. Petitioner advised DeClercq that he was not in the area and that he had car trouble. Later that day, the FBI had DeClercq place a recorded call to Petitioner to reschedule the meeting and find out the type of vehicle Petitioner would be driving to the meeting.

June 23, 1999, the meeting between Petitioner and DeClercq was held in a parking lot on Century Boulevard in front of a Denny's Restaurant near the Los Angeles Airport. DeClercq was equipped with a recording device that allowed the FBI to monitor the conversation.

Petitioner gave DeClercq $4,000 and four photographs of the intended victim and a Post-It with the words "68 years, So Tang, 11508 East Rosecrans Avenue, Norwalk, California." Following the meeting, DeClercq exited the vehicle and Agent Callahan along with several other agents confronted Petitioner and arrested him. When Callahan was identifying himself, Petitioner

stated, "I understand. I made a mistake. I am going to cooperate."

REASONS FOR GRANTING THE WRIT

This case involves conduct by law enforcement that violates "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960). Petitioner's sole defense was that he was a victim of governmental entrapment. DeClercq, the primary government agent involved in this case, was a man with a extensive criminal background. DeClercq, based on his pending state and federal criminal cases against him, had the incentive to apply undue pressure on Petitioner to go forward with the commission of the crime that Petitioner was very reluctant to commit. Each time Petitioner waned in his tentative commitment, DeClercq would, on his own initiative, contact Petitioner to prod him along so DeClercq could use his assistance with the government in order to reduce his own sentence exposure. Petitioner's lack of predisposition to commit the charged crimes and the extreme inducement applied on Petitioner by the government's agents constituted entrapment as a matter of law as well as conduct of law enforcement agents so outrageous that due process principles should bar the government from invoking judicial processes to obtain the convictions.

The opinion from the Sixth Circuit and the way this record squarely poses the issues for resolution makes

Petitioner's case an ideal vehicle for this Court to clarify this important area of Fifth Amendment law while finding that Petitioner's constitutional due process rights were blatantly disregarded.

1. THIS COURT, BASED ON THE UNIQUE FACTS OF THIS CASE, SHOULD ESTABLISH AS A RULE OF LAW THAT ENTRAPMENT AS A MATTER OF LAW IS A DEFENSE OF CONSTITUTIONAL DIMENSION.

The Constitution may require an entrapment defense as a matter of due process where police conduct violates the notion of fundamental fairness and universal sense of justice. To date, however, while federal and state courts have found such due process violations in certain cases of entrapment, this Court has not held that an entrapment defense is constitutionally guaranteed. The facts of this use clearly illustrate that the time has arrived to address this important issue.

This Court has found entrapment as a matter of law where it was "patently clear" that a defendant was induced by a government informer to commit a crime, *Sherman v. United States*, 356 U.S. 369, 373-75, 78 S.Ct. 819 (1958). The courts must be vigilant in protecting citizens against agents of the government who "implant in the mind of an innocent person the disposition to commit [a crime] and induce its commission in order that they may prosecute." *Sorrells v. United States*, 287 U.S. 435, 442, 53 S.Ct. 210, 212-13 (1932).

The Government must therefore prove beyond a reasonable doubt that a predisposition to commit the

particular crime for which the defendant was indicted existed prior to and independent of Government contact with him. *Jacobson v. United States,* 503 U.S. 540, 549, 112 S.Ct. 1535, 1540-41. Predisposition is "the defendant's state of mind before his initial exposure to government agents." *United States v. Johnson,* 855 F.2d 299, 303 (6th Cir. 1988).

In *Jacobson,* government agents maintained continual contact with the defendant corresponding with him and sending him leaflets purporting to be from organizations dedicated to free speech rights, "sexual freedom" and "freedom of choice," which suggested that child pornography, pedophilia and other aberrations should be legalized. *Jacobson,* 503 U.S. at p. 552, 112 S.Ct. at p. 1542. Only after some two and a half years did the agents provide the defendant with the opportunity to order child pornography through the mail, and then convicted him when he took the bait. The court held that the jury was left with no way adequately to determine that "petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many varied approaches to petitioner." Id.

Factors relevant in determining whether a defendant is predisposed to commit a crime are: (1) The character or reputation of the defendant, including any prior criminal record; (2) Whether the suggestion of the criminal activity was initially made by the Government; (3) Whether the defendant was engaged in the criminal activity for profit; (4) Whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Governmental inducement or persuasion; and (5) The nature of

the inducement or persuasion supplied by the Government. *Johnson*, 855 F.2d at 303; *United States v. McLernon*, 746 F.2d 1098, 1112 (6th Cir. 1984); *United States v. Kaminski*, 703 F.2d 1004, 1008 (7th Cir. 1983). The Sixth Circuit has recognized that the most important of the above five factors in determining the lack of predisposition as a matter of law is "whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducements." *McLernon*, 746 F.2d at p. 1113.

The Court of Appeals, in its opinion, acknowledges that the pivotal factor in determining the lack of predisposition as a matter of law – whether the defendant demonstrated reluctance to engage in the criminal activity that was overcome by repeated government inducement or persuasion. (App. 11.) The factual scenario of this case shows tremendous reluctance of Petitioner to go forward with the murder-for-hire scheme and overcome by repeated inducement and persuasion from DeClercq.

When the relevant criteria set forth above are applied to the facts of this case, it is clear that Petitioner was not predisposed to commit the crime of hiring DeClercq to murder So Tang. In considering these factors, it must be noted initially that the Government presented no evidence of the character or reputation of Petitioner, including any prior criminal record, from which a reasonable juror could have found that Petitioner was predisposed to violate 18 U.S.C. § 1958. In *Sherman*, this Court held that evidence of a prior criminal record alone is insufficient as a matter of law to establish predisposition. 356 U.S. at 375, 78 S.Ct. at 822. In the case at bench, the government

did not even present evidence of Petitioner's prior criminal record.

The undisputed testimony reveals instead that Petitioner was "honorable, kind, gentle, just a wonderful man." Petitioner is an honest individual and he always strived to be fair in his dealings with people. Petitioner was "pretty easy going" and was not "quick to anger." Indeed, even the victim's son described Petitioner as "a kind, gentle, hardworking, honest person" and that being charged with trying to hire someone to kill his father was "out of character" for Petitioner. This uncontroverted evidence of Petitioner's "character or reputation" and background reveals absolutely no propensity for criminal involvement prior to governmental inducement. See *Kaminski*, 703 F.2d at 1008. The record is void of evidence from which a reasonable juror could have concluded that Petitioner's character or reputation predisposed him to engage in an illicit murder for hire scheme against So Tang.

Moreover, the record demonstrates with no doubt that government agent DeClercq pursued Petitioner relentlessly until Petitioner finally succumbed to the pressure put on him by DeClercq. It is true that DeClercq testified that it was Petitioner that initially made the statement to DeClercq that he wanted So Tang "to make a trip to Mexico and never come back" and that Petitioner would pay $100,000 for that to happen. However, as FBI agent Callahan candidly admitted, a murder for hire offense had not been committed since the victim's identity had not been given. In fact, the identity of So Tang had not been revealed until June 1999, eleven months after DeClercq's initial contact with Petitioner. The jury

was instructed that DeClercq became an agent of the government on October 27, 1998. As will be shown infra, "the suggestion of criminal activity was initially made by the Government." *Kaminski,* 703 F.2d at 1008. Between October 27, 1998 and the date the actual crime was commited on June 23, 1999, the Government engaged in a campaign of relentless pursuit of Petitioner that inevitably resulted in the commission of the crime.

As indicated earlier, the most important factor in determining the lack of predisposition as a matter of law is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducements. *Kaminski,* 703 F.2d at 1008 (quoting *United States v. Reynosa-Ulloa,* 548 F.2d 1329, 1336 (9th Cir. 1977)). Petitioner's reluctance is evidenced by the fact that DeClercq continually increased the pressure until Petitioner finally acquiesced in his demands. The nature of the government inducement in this case is very unique.

The chronology of relevant events is as follows:

- July 1998: Petitioner initially met DeClercq through Campbell.

- October 27, 1998: DeClercq originally met with the FBI.

- October 27, 1998: First recorded telephone call, initiated by the Government, took place between DeClercq and Petitioner where the Government directed DeClercq to ask Petitioner if the Petitioner still had the problem and whether Petitioner wanted DeClercq to help him with it.

- November 5, 1998: Second recorded telephone call was placed by DeClercq to Petitioner where the Government directed DeClercq to attempt to arrange a personal meeting with Petitioner where Petitioner was to bring information on the intended victim including his name and a photograph.

- December 14, 1998: Meeting at Marriott Hotel between Petitioner and DeClercq in which Petitioner did not bring information on the intended victim.

- December 31, 1998: An unrecorded phone call was made by DeClercq to Petitioner which was in violation of the agreement between DeClercq and the FBI. The content of this conversation is unknown.

- On January 5, 6, 11, 13, and 19, 1999: DeClercq made recorded telephone calls to Petitioner and either left a message for Petitioner to call him back or had general conversations with Petitioner regarding watches or when the job would be done.

- February 1999: Petitioner called DeClercq at his home. This call was not recorded and Petitioner advised DeClercq that he was thinking about having someone else commit the murder for a lower price.

- February 1999: DeClercq sent Petitioner a watch that he lowered the price on from $2700 to $1700. In March 1999, the watch was returned to DeClercq.

- Between March 21, 1999 and April 8, 1999: DeClercq called Petitioner approximately four times and left messages for Petitioner. These messages were not returned by Petitioner.

- In early June 1999: DeClercq attended a watch and jewelry show in Las Vegas, Nevada. DeClercq made an unrecorded telephone call to Petitioner in violation of his agreement with the FBI. DeClercq made this call to Petitioner because he had not talked to Petitioner in 3 or 4 months. After talking about watches, DeClercq asked Petitioner about his problem and Petitioner informed him that he paid someone else $50,000 to do the job and he took his money and kept going. DeClercq then negotiated a price of $30,000 to do the job.

It is clear from portions of the above-referenced record that from DeClercq's first recorded telephone call to Petitioner on October 27, 1998 up to December 14, 1998 when DeClercq and Petitioner personally met in a hotel room at the Marriott Hotel, a violation of 18 U.S.C. § 1958 – murder for hire had not occurred because just some very general discussions had taken place between Petitioner and DeClercq. In fact, the meeting in the Marriott Hotel on December 14, 1998 is when Petitioner started to exhibit reluctance to hiring DeClercq to kill the victim because Petitioner was supposed to bring the so-called "packet" with the targeted victim's name, photographs of the victim, victim's address, etc. However, Petitioner failed to bring the "packet" to that meeting which shows a reluctance on the part of Petitioner to go through with the plan.

As indicated earlier, in February 1999, DeClercq sent Petitioner a watch and the watch was returned to DeClercq. Between March 21, 1999 and April 8, 1999, DeClercq called Petitioner four times and left messages, yet these messages were not returned by Petitioner. The month of March 1999 is very significant because on

March 20, 1999, DeClercq was arrested for theft and was being charged as a habitual criminal. It was critical for DeClercq to do whatever he could to get this murder for hire scheme to work or DeClercq, who was in deep trouble with the criminal justice system (both on a state and federal level) would not obtain any benefit for his efforts thus far.

Transcripts of all the recorded telephone calls between Petitioner and DeClercq were introduced into evidence in this case, as well as the recorded personal contacts between Petitioner and DeClercq on December 14, 1998 and June 23, 1999. When these transcripts are reviewed, it reveals a repetitious and escalating inducement by DeClercq which undeniably overcame Petitioner's resistance to enter into the murder-for-hire scheme.

Petitioner's reluctance to go ahead with the plan to hire DeClercq to kill So Tang is clearly evidenced by Petitioner not returning DeClercq's phone calls in March and April 1999 and not initiating telephone calls to DeClercq in May or June 1999. Additionally, Petitioner's reluctance can be inferred by Petitioner fabricating a story that he hired someone else to do the killing and the so-called killer ripped him off for $50,000. Petitioner contends that if DeClercq had not made the unrecorded phone call from Las Vegas to Petitioner in early June 1999, the crime would have never occurred. This is clearly evident by the extreme amount of pressure put on Petitioner by the manipulative DeClercq. On June 16, 1999, during a recorded telephone conversation initiated by DeClercq to Petitioner, the following colloquy takes place:

DeClercq: We'll take care of business. I got, you know, I'm working with other . . .

Eng: Okay.

DeClercq: . . . people too, you know. I, with . . .

Eng: Understand.

DeClercq: . . . m, you know, you understand all of this now?

Eng: Yep.

DeClercq: Okay. Okay. Not to belabor the point Keith, but to make sure you have everything that I need with you, at this time. I have things in motion and I'm going to be in a bad position . . .

Eng: I know.

DeClercq: . . . if you, if you're not ready to proceed with what I need . . .

Eng: I know, I know.

DeClercq: . . . to do this job.

Eng: I know.

DeClercq: You know you screwed up once, uh, up there in December . . .

Eng: I know.

DeClercq: . . . you should of come with the money and then, uh, it all had been taken care of.

Eng: I know. Yeah, I know.

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." *Sherman*, 356 U.S. at 372, 78 S.Ct. at 820.

In *United States v. Echols*, 253 F. 862 (D.C. Tex. 1918), the court said:

> It is clearly the law that, while it may be true that the mere aiding of one in the commission of a criminal act by a government officer, or agent, does not preclude the conviction of the party committing the crime, yet, where the officers of the law have incited or induced the commission of the crime, and lured the defendant on to its commission, the law will not authorize a verdict of guilty.

In this case, DeClercq's participation goes way beyond just aiding Petitioner in the commission of a crime. DeClercq's continual telephone calls to Petitioner as well as his comments to Petitioner such as: "Now remember, don't yank my chain anymore. I was ready to take care of this for you last December," clearly show that DeClercq "incited or induced the commission of the crime."

In *Morales v. United States*, 260 F.2d 939 (6th Cir. 1958) the Sixth Circuit held that where there was no proof that defendant had any contact with persons engaged in illicit sales of narcotics nor any evidence whatsoever of circumstances that would justify even a reasonable suspicion that he was engaged in the traffic, and defendant was not an addict, had no criminal record, obtained and transferred marijuana only after being repeatedly requested to do so by an informer ten or fifteen times to get it from a

certain person so that he could make money out of it, and finally succumbed to the repeated pressure of the undercover agent, the Court held that, under these circumstances, there was "entrapment" and defendant could not be convicted of transferring the marijuana in violation of the law.

When all the evidence presented in this case is even viewed in a light most favorable to the prosecution, the similarities between the tactics the Government used in *Morales* and the tactics utilized in this case are very close. It was only after the repeated pressure of DeClercq in telephone calls and implied threats to Petitioner did Petitioner succumb and finally meet with DeClercq on June 23, 1999 and consummate the crime of hiring DeClercq for the murder of So Tang. Such conduct by the government clearly constitutes entrapment as a matter of law.

Petitioner is requesting this Court to recognize that some government activity might be so grossly shocking to be violative of due process regardless of whether the requirements of entrapment have been met. The facts of this case inevitably calls to mind the celebrated passage in the alternative ground of Mr. Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 385 (1928):

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government

> becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

CONCLUSION

In summary, this Court should grant certiorari so that law enforcement practices will remain subject to constitutional limitations and to judicially fashion rules to enforce those limitations.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 00-2098

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEITH WAI KEUNG NG, also known as Keith Eng,

Defendant-Appellant.

_____/

On Appeal from the United States District Court for the Eastern District of Michigan

(Filed Dec. 18, 2001)

Before: GUY and BOGGS, Circuit Judges; and CARR, District Judge.*

PER CURIAM. Defendant, Keith Wai Keung Ng, a/k/a Keith Eng, appeals his conviction and sentence on three counts of using interstate commerce facilities with intent to commit a murder-for-hire in violation of 18 U.S.C. § 1958. Challenging his convictions, Ng argues (1) that the district court abused its discretion in denying his motion to consolidate counts as multiplicitous, and (2) that the facts establish entrapment as a matter of law. With respect to sentencing, defendant claims he should have been awarded a two-level reduction in the offense level for acceptance of responsibility and a downward departure on the grounds of imperfect entrapment.

* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

Finally, defendant claims he was denied effective assistance of counsel as a result of the failure to move for a new trial based on newly discovered evidence. After review of the record and the arguments presented on appeal, we affirm defendant's convictions and sentence.

I.

The charges arose out of numerous conversations and two face-to-face meetings between Ng and Donald DeClercq, during which Ng allegedly arranged to pay DeClercq to murder Dr. So Tang. Ng was arrested on June 23, 1999, after giving DeClercq a down payment of $4,000 in cash, four pictures of Dr. Tang, and a note with Dr. Tang's name and address. Ng claimed he was entrapped by DeClercq, who was cooperating with the FBI. Ng was convicted by a jury on three counts of violating the federal murder-for-hire statute. The indictment alleged: (1) that Ng traveled from California to Michigan on or about December 12, 1998, with intent that the murder of Dr. Tang be committed for $100,000; (2) that Ng caused DeClercq to travel from Michigan to California on June 22, 1999, with intent that the murder of Dr. Tang be committed for $30,000; and (3) that from October 27, 1998, through June 23, 1999, Ng used a facility in interstate commerce (the telephone) with intent that the murder of Dr. Tang be committed as consideration for something of pecuniary value.

Keith Ng became acquainted with Dr. Tang, an anesthesiologist, and his wife, Hsin-Ming Tang, while working as a general contractor in the construction of their

house and a medical office building in San Marino, California. In 1988, Ng and the Tangs invested in a vineyard located in Santa Maria, California. The Tangs held the deed, but orally guaranteed Ng a twenty-percent share. Ng moved to Santa Maria to run the vineyard. Dr. Tang discovered that his wife was having an affair with Ng. In 1996, the vineyard, along with other property, was conveyed to the Tangs' two children. At that time, Ng was promised that his interest would be honored. Mrs. Tang, who was separated from her husband, filed for divorce. In 1997, Dr. Tang filed a lawsuit seeking to set aside the property transfers as fraudulent.

Ng and Hsin Tang traveled to Michigan more than once to help her son, George Tang, who had started his medical residency training in the Detroit area. During a visit in July 1998, George's neighbor, Larry Campbell, took Ng to several antique and pawn shops to look for watches and introduced him to DeClercq. After discussing their mutual interest in watch collecting, DeClercq arranged for Ng to come to his home located in Bloomfield, Michigan, from which he operated a business called DeClercq's Watches. Within a few days, Ng had visited DeClercq twice and purchased two expensive watches. Ng paid DeClercq $8,000 in cash and gave him a $4,000 check written to "cash."

During one visit, DeClercq and Ng spent an hour or two talking. According to DeClercq, Ng said he ran a vineyard and was "having a problem" with someone who had lent him $250,000 to open the vineyard. Ng said this person was demanding $5 million to release a lien that was clouding title to the property and making it difficult to borrow money to keep the business going. Ng told

DeClercq, "I would pay $100,000 just to make sure this person went to Mexico and never returned." Ng seemed serious and, when questioned further, Ng offered to pay $100,000; $50,000 down and $50,000 when the problem went away. DeClercq asked if he wanted this man murdered, and Ng answered that he wanted this problem to "go away." DeClercq was suspicious, but told Ng he would look into it.

Ng offered a different version of this meeting. Ng testified that he went to DeClercq's house to pay for the watches, and DeClercq showed him around. DeClercq also showed him a stack of pictures of naked women and asked him to pick one, but Ng was not interested. When Ng told DeClercq he owned a vineyard, DeClercq said he had friends in South America with money to invest in legitimate businesses. Ng said he was not interested in a partner because he had his own problems with a lawsuit pending, liens on the property, and loans to pay. That, Ng claimed, was when DeClercq offered to "fix [his] problem" and make it disappear like Jimmy Hoffa. Ng didn't know who Jimmy Hoffa was, so DeClercq told him to rent a movie called "The Jackal" or one called "The Mechanic." Although shocked by this discussion, Ng testified that he remained calm and stayed for a few drinks. Ng came back a few days later to have his Rolex fixed and to see a watch DeClercq wanted to sell for $80,000. Ng did not buy the watch and returned to California shortly thereafter.

DeClercq, who was under criminal investigation by the IRS, went to see his attorney. Concerned that the solicitation could be "a set up," they also recognized that it might be an opportunity to improve his situation with

the IRS. Inquiries made through the United States Attorney's Office led to an interview with FBI Agent Joseph Callahan on October 27, 1998. DeClercq thought it was possible that Campbell might have told Ng that DeClercq was connected to the mafia. Callahan decided to monitor a call from DeClercq's home to Ng's cellular telephone in California the same day.

At the outset of the conversation on October 27, DeClercq asked Ng: "You still have that problem?" Ng replied: "Yep . . . I don't know which way to turn." After discussing Ng's travel plans. DeClercq told him he should be in Texas when "things happen" and explained that "[i]n other words, you know, . . . the best time for the house to burn down is when you're on vacation." Ng said "[y]eah." "I know," "I, be, I be in Paris." When DeClercq asked for the person's name, Ng responded: "No I don't wanna talk on the phone . . . [s]omebody may listen to the phone."

On November 5, 1998, at Callahan's direction, DeClercq asked Ng to put together a package including photographs, a description of the car, and background information about the intended victim to bring to a face-to-face meeting in Michigan. Ng responded: "[N]o problem I have all that, I have all that in my folders . . . I been follow this tail for long time." They agreed to talk in a few days.

When DeClercq called Ng on November 16, Ng told him he had purchased a telephone card so that his calls to DeClercq could not be discovered. Ng invited DeClercq to fly to California to "get a, visual inspection you

know?" DeClercq said he would think about it, and they then discussed a watch Ng was interested in buying.

Ng called DeClercq back the next day and asked him to come to California and said, "I mean the, the, the merchandise is here, if you want to look at it." They talked about their schedules and DeClercq asked, "when do you want this watch stopped?" Ng answered: "Anytime. Sooner the better." At Callahan's direction, DeClercq attempted to arrange for their meeting to take place in Detroit. DeClercq asked for the name of the lender for the vineyard. Ng responded that he'd gotten an extension for a couple of months, but that "this is on the way, so you clean the title for me."

On December 11, 1998, Ng flew from California to Michigan to meet DeClercq in person. At Callahan's direction, DeClercq arranged to meet Ng in a hotel room in Troy, Michigan, at noon on December 14, 1998. The meeting was recorded and videotaped. After they discussed watches for a while, DeClercq brought up the "other thing." Ng looked around and asked about "cameras." Ng told DeClercq to talk in simple terms "in case somebody had a tape on it." DeClercq asked Ng if he was sure he wanted to do this. Ng immediately answered "yes" and said he had "no choice."

During their meeting, Ng agreed to pay $100,000, with a $25,000 down payment. Although DeClercq asked Ng how he wanted it to happen, Ng made it clear he did not want to know. When DeClercq asked for the package of information, Ng assured him that he had everything ready and would give it to him with the down payment. They agreed to do it after the holidays, when Ng had the

money ready. Ng also talked about the need to pay for Buddhist monks to pray to be sure the spirit would be at peace so it would not bother them.

During several calls in January 1999, Ng told DeClercq he was ready to "get it done and over with." On January 13, Ng told DeClercq that "the main thing is I'm ready, and the money's ready, everything is ready." Ng wanted it done by the end of January, and DeClercq agreed to go to Los Angeles within the next ten days. Ng planned to meet DeClercq, show him where the victim lived, and then leave town. The FBI decided to delay the meeting to try to determine the identity of the intended victim. As a result, DeClercq called Ng on January 19, and put off his trip to Los Angeles. Ng said he'd like to "get it done" by the end of February.

Ng called DeClercq during the first week of February and said he had someone else who could possibly take care of it for a much lower price, but didn't trust him. DeClercq called Ng on February 17, 1999, and they arranged that Ng would call DeClercq on March 22 and they would do it that week. Around this time, DeClercq sent Ng a watch he thought he might buy. The watch was returned to DeClercq. When Ng did not call as expected, DeClercq called and left four messages for Ng between March 29 and April 7, 1999. At that point, Callahan felt the case was slipping away and told DeClercq not to call Ng.

In June 1999, DeClercq was in Las Vegas to attend a huge watch show. DeClercq, who was calling his previous customers, made an unmonitored call to Ng on June 14. DeClercq asked Ng about his problem, and Ng told him

that he had hired someone else for $50,000 but that the guy just took his money and left town. As a result, Ng said he could no longer afford to pay $100,000. They renegotiated the price and Ng agreed to pay $30,000, with $5,000 down. Callahan had DeClercq make a monitored call to Ng on June 16 to rehash their last conversation. Ng said he had paid someone else, who did not do the job. Ng wanted DeClerq to take care of the problem for $30,000, paying $5,000 down and the rest "on completion of the job." They agreed that DeClercq would come to Los Angeles the following week.

On June 22, 1999, DeClercq, accompanied by Callahan, flew from Detroit, Michigan, to Los Angeles, California. Once in Los Angeles, DeClercq called Ng and arranged to meet him outside a Denny's restaurant the next morning. DeClercq wore a recording device and the meeting was videotaped. When DeClercq got into Ng's Cadillac, Ng patted him down. Ng gave DeClercq the address of Dr. Tang's office and explained that Tang lived in one of the back rooms. Even then, Ng would not say Dr. Tang's name until DeClercq insisted so he could be sure he "got the right guy." DeClercq was unable to get Ng to identify the person he said he had hired, despite offering to get his money back for him. Ng gave DeClercq $4,000 in cash, and they agreed DeClercq would get $26,000 when he had pictures of the murdered Dr. Tang. DeClercq asked Ng how he wanted it done. Ng volunteered that Dr. Tang had a heart condition and said "[y]ou can turn on the gas and blow the whole f-ing house . . . I don't care . . . you can choke him . . . no air's the best." After DeClercq left the car, FBI agents arrested Ng.

Defendant filed a pretrial motion to consolidate the charges as multiplicitous, which was denied. At the conclusion of trial, the jury found defendant guilty of all three counts. Defendant was sentenced to 120 months' imprisonment on count one, to be followed by concurrent one-month terms of imprisonment on counts two and three. Defendant was also sentenced to three years of supervised release. This appeal followed.

II.

A. Entrapment as a Matter of Law

Defendant argues that his convictions should be reversed because the facts establish entrapment as a matter of law. There are two related elements to a valid entrapment defense; government inducement of the crime and a lack of predisposition on the part of the defendant. *Mathews v. United States*, 485 U.S. 58, 63 (1988). *See also Jacobson v. United States*, 503 U.S. 540, 548 (1992). Predisposition "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Mathews*, 485 U.S. at 63 (citations omitted). "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *United States v. Russell*, 411 U.S. 423, 436 (1973).

Entrapment is generally an issue for the jury, not the court. *United States v. Barger*, 931 F.2d 359, 366 (6th Cir. 1991). In order to succeed on a claim of entrapment as a matter of law,

> the testimony and facts must be undisputed; a court may not choose between conflicting testimony or make credibility determinations. Furthermore, the undisputed evidence must demonstrate a "patently clear" absence of predisposition. If either of these elements is missing, then the predisposition question is for the jury to decide.

United States v. Pennell, 737 F.2d 521, 534 (6th Cir. 1984) (citations omitted). Once entrapment is placed in issue, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the offense. *See United States v. Johnson*, 855 F.2d 299, 303 (6th Cir. 1988). In determining whether the evidence was insufficient as a matter of law to establish predisposition, we must view the evidence and draw all inferences in the light most favorable to the prosecution. *Barger*, 931 F.2d at 366 (quoting *United States v. McLernon*, 746 F.2d 1098, 1111 (6th Cir. 1984)).[1]

"Predisposition" means the defendant's state of mind before coming into contact with government agents. *See McLernon*, 746 F.2d at 1112. Several factors are relevant to this determination: the defendant's character and reputation, including any criminal record; whether the suggestion of criminal activity was initially made by the government or the defendant; whether the defendant was

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[1] The government argues that because defendant did not move for judgment of acquittal under Fed. R. Crim. P. 29 at the close of the evidence, we may only review the sufficiency of the evidence for plain error resulting in "manifest miscarriage of justice." *See United States v. Price*, 134 F.3d 340, 350 (6th Cir. 1998); *United States v. Cox*, 957 F.2d 264, 265 (6th Cir. 1992). Since there was no error, there also was no plain error.

engaged in the criminal activity for profit; whether the defendant was reluctant to commit the offense and overcome only by repeated government inducement or persuasion; and the nature of the government's inducement or persuasion. *Id. See also Barger,* 931 F.2d at 366.

Applying these factors, Ng argues that it is clear he was not predisposed to commit the offenses. There was no evidence that Ng had a criminal record. Several witnesses who testified about his character described Ng as honest, kind, gentle, easy going, and not quick to anger. Even George Tang testified that it was out of character for Ng to try to arrange a contract killing. However, defendant concedes, as he must, that the evidence was disputed concerning whether he or DeClercq was the first to suggest killing Dr. Tang. But, there is no dispute that Ng stood to benefit from Dr. Tang's death as it would clear title to the vineyard.

Ng relies heavily on the factor that we have described as being the most important in determining the lack of predisposition as a matter of law – whether the defendant demonstrated reluctance to engage in the criminal activity that was overcome by repeated government inducement or persuasion. *McLernon,* 746 F.2d at 1113. Claiming that DeClercq pursued him relentlessly until he finally succumbed to the pressure, Ng emphasizes that it took eleven months for Ng finally to give DeClercq the intended victim's name and a down payment for the murder. Ng states that there were apparently no conversations between July and October 1998. The telephone records, however, indicate that not only were there calls between them, but also that two of the calls were initiated by Ng.

At no time was Ng heard to express doubts about going ahead with the murder. In fact, the only reluctance Ng actually expressed was reluctance to talk about their plans over the telephone in anything but oblique terms. Concerned that someone might be listening or watching, Ng nonetheless repeatedly assured DeClercq that he "was ready." In November 1998, Ng invited DeClercq to come to California for "a visual inspection" of the "merchandise" and indicated that the sooner the "watch was stopped" the better. During the December meeting, Ng agreed on a price and decided to have DeClercq do it after the holidays. Nor did their conversations in January suggest either reluctance or government inducements to go forward. Although DeClercq made an unmonitored call to Ng on December 29, no evidence was offered concerning the content of that conversation.

Finally, Ng claims that a lack of predisposition can be inferred from his failure to call DeClercq in March or return the four messages DeClercq left for him. Ng testified that he did not contact DeClercq because he did not want to go forward with the murder. Ng denied having actually hired someone else during that time, and claimed to have made up the story to put DeClercq off. Ng emphasizes that DeClercq found himself in more trouble and had a greater interest in seeing the plan go forward after he was arrested on March 20, 1999, for theft and charged with being a habitual offender. Although DeClercq was certainly trying to help himself by cooperating with the FBI, he did not try to contact Ng between the first week of April and mid-June. When taken in the light most favorable to the prosecution, a rational trier of fact could conclude that Ng did not contact DeClercq for

several months because he had arranged for someone else to do the job for less, did not have the money to pay DeClercq, or wanted to get DeClercq to do it for less.

Maybe Ng would not have brought DeClercq to Los Angeles if DeClercq had not called him on June 14. Yet, Ng did not claim that DeClercq had offered inducements, exerted pressure, or made threats that caused Ng to go forward with the murder in June 1999. The evidence concerning predisposition was clearly disputed and the jury's conclusion rested in large part on the jury's credibility determinations. Therefore, we cannot find entrapment as a matter of law and the issue was properly submitted to the jury. Further, we find that when the evidence and inferences are taken in the light most favorable to the prosecution, a reasonable juror could find defendant was predisposed to commit the offenses beyond a reasonable doubt.

B. Multiplicitous Counts

The district court denied defendant's motion to consolidate the three counts as multiplicitous. Defendant maintains that the indictment was multiplicitous because it actually charged a single offense in several counts. Multiple charges put the defendant in jeopardy of multiple sentences for a single offense and may suggest to the jury that he committed not one but several offenses. *See Ball v. United States*, 470 U.S. 856, 867-68 (1985); *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988). We review for abuse of discretion the district court's decision whether to require the prosecution to elect between multiplicitous counts. *United States v.*

Throneburg, 921 F.2d 654, 657 (6th Cir. 1990). The remedy for multiplicitous prosecutions and convictions is for the sentencing court to vacate or merge any multiplicitous counts. *Id.* (quoting *Ball*, 470 U.S. at 864).

Defendant was charged with three violations of the federal murder-for-hire statute, which provides in pertinent part:

> Whoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use . . . any facility in interstate or foreign commerce, with intent that a murder be committed . . . as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined . . . or imprisoned for not more than ten years, or both[.]

18 U.S.C. § 1958. Applying the *Blockburger* test, the district court concluded that the charges did not violate double jeopardy because they each involved proof of facts not required by the others: namely, defendant's own interstate travel, defendant's having caused DeClercq to travel interstate, and defendant's use of an interstate communication facility in the murder-for-hire scheme. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *See also Murr v. United States*, 200 F.3d 895 (6th Cir. 2000) (same elements test).

The district court also rejected defendant's claim that the government had impermissibly divided a single offense into several counts, finding that this case could not be distinguished from *United States v. Snelenberger*, 24 F.3d 799, 803 (6th Cir. 1994). In *Snelenberger*, the defendant

was charged separately with threats he made against a magistrate judge to two different people at two different places in the course of being involuntarily hospitalized.

Defendant argues that the statute is intended to punish, as a unit of prosecution, the hiring of someone to kill another person. Since it was charged in each count that he intended for DeClercq to murder Dr. Tang, defendant argues there was only one offense. The proscribed conduct, however, is traveling or causing another to travel in interstate commerce, or using or causing another to use facilities of interstate commerce, with intent that a murder-for-hire be committed. *See United States v. Ransbottom*, 914 F.2d 743, 746 (6th Cir. 1990). Relying on two Sixth Circuit decisions, defendant argues that the element of interstate travel or use of facilities of interstate commerce are nothing more than "jurisdictional requirements." *See United States v. Weathers*, 169 F.3d 336 (6th Cir. 1999); *United States v. Winters*, 33 F.3d 720 (6th Cir. 1994). Defendant's reliance on these cases is misplaced.

In *Weathers*, the court was faced with the question of whether the intrastate use of a facility of interstate commerce would satisfy the jurisdictional requirement of § 1958. Concluding that the facility must have been used in interstate commerce, the court described the "substantive prohibition" of the offense as the use of a "facility in interstate commerce" with intent that a murder-for-hire be committed. The court was not asked to decide whether more than one offense could be committed as part of a scheme to commit a murder-for-hire.

Examination of the decision in *Winters* makes clear that defendant misapprehends the significance of the

jurisdictional element. In that case, the defendants were charged with using or causing another to use the mails with intent to commit murder-for-hire in violation of § 1958. The defendants argued that the government must prove that they intended that the mails be used, not just that they intended that a murder-for-hire be committed. In rejecting this claim, the court held that "there is no intent requirement with respect to the use of the mails and that this element of the crime is jurisdictional in nature." 33 F.3d at 721. The court then took care to note that

> [t]he significance of labeling a statutory requirement as "jurisdictional" is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.

Id. at n. 1 (internal quotations omitted) (quoting *United States v. Feola*, 420 U.S. 671, 676-77 n.9 (1975)). The plain language of the statute makes clear that the evil it intended to proscribe was the interstate travel and use of facilities in interstate commerce with intent that a murder-for-hire be committed. The defendant's own travel from California to Michigan in December 1998 was a separate offense from his causing DeClercq to travel from Michigan to California in June 1999, even though they were committed as part of an ongoing scheme to commit murder-for- hire. Further, the defendant's use of a facility in interstate commerce between October 1998 and June 1999 was properly charged as a separate offense.

C. Sentencing

Defendant argues that the district court erred by denying his request for a two-level reduction in his offense level for acceptance of responsibility. U.S. SENTENCING GUIDELINES MANUAL (USSG) § 3E1.1(a). We review the district court's determination regarding acceptance of responsibility for clear error. *United States v. Mahan*, 190 F.3d 416, 418 (6th Cir. 1999). Generally, the reduction for acceptance of responsibility is not intended to apply to a defendant who denies the factual elements of guilt at trial and only admits guilt and expresses remorse after he is convicted. *United States v. Hill*, 167 F.3d 1055, 1071 (6th Cir. 1999).

The district court recognized that defendant's assertion of an entrapment defense at trial did not necessarily preclude a reduction under § 3E1.1(a). *United States v. Fleener*, 900 F.2d 914, 918 (6th Cir. 1990). At the same time, "*Fleener* does not stand for the proposition that all defendants who go to trial and assert entrapment are entitled to receive the reduction for acceptance of responsibility. Rather, *Fleener* holds that such a reduction is not *per se* unavailable[.]" *United States v. Hernandez*, 31 F.3d 354, 361 (6th Cir. 1994). Defendant relied on the statements he made at the time of his arrest: "I understand. I made a mistake. I'm going to cooperate." After exercising his right to counsel, however, Ng chose not to make a statement. In *Fleener*, the reduction was specifically tied to the defendant's voluntary cooperation in providing evidence to the government. Here, the district court heard the

testimony, noted that the jury disbelieved Ng, and concluded that the reduction was not warranted in this case. We find no clear error in this regard.

Defendant also sought a downward departure from the guideline range of 121 to 151 months' imprisonment on the grounds of "imperfect entrapment." *See United States v. Coleman*, 188 F.3d 354, 358-59 & n.3 (6th Cir. 1999) (*en banc*) (improper government action is permissible basis for downward departure). The refusal to depart downward is not reviewable on appeal unless the district court did not recognize that it had the discretion to do so. *United States v. Prince*, 214 F.3d 740, 766 (6th Cir.), *cert. denied*, 531 U.S. 974 (2000).

It is clear from our review of the arguments and the district court's ruling on the issue that the district court considered the actions of the government agent as a possible basis for downward departure, but found such a departure was not warranted on the facts. The district court noted that the inducements were nothing more than telephone calls, found that it was not improper for DeClercq to have initiated contact with Ng, and concluded as follows:

> So the real reason that I think it inappropriate to depart is, as I have said, this is not conduct outside the heartland and to the extent that I do agree with [defense counsel] there was an element [or] aspect of ambivalence or reluctance on Mr. Ng's part at different points of this series of events, I do think that can be accounted for within the established guideline range and no departure would be necessary for that.

Since there is no indication that the district court believed that it lacked discretion to depart downward, we have no jurisdiction to review this claim of error.

D. Ineffective Assistance of Counsel

Defendant claims he was denied effective assistance of counsel when his attorneys failed to move for a new trial under Fed. R. Crim. P. 33, on the grounds of newly discovered evidence of wrongdoing by DeClercq. A claim of ineffective assistance of counsel is ordinarily not reviewed on direct appeal because of the lack of an adequate factual record. *United States v. Tucker*, 90 F.3d 1135, 1143 (6th Cir. 1996). Instead, these claims are more properly brought in a post-conviction proceeding under 28 U.S.C. § 2255. *Id. See also United States v. Aguwa*, 123 F.3d 418, 423 (6th Cir. 1997). Only if the record is sufficiently developed to allow the court to evaluate counsel's performance, will this court consider an ineffective assistance claim on direct appeal. *See United States v. Snow*, 48 F.3d 198, 199 (6th Cir. 1995).

Defendant relies on newly discovered evidence that DeClercq was alleged to have attempted to bribe a police officer. DeClercq was facing charges of retail fraud, which was known at the time of trial and used to impeach DeClercq's credibility. DeClercq allegedly approached an officer on March 13, 2000, shortly before testifying in defendant's trial, and asked the officer to make the stolen property disappear from the police station. Because the facts concerning the alleged bribery charge have not been

developed in the record, we decline to review defendant's claim of ineffective assistance of counsel.[2]

AFFIRMED.

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[2] We do note, however, that a motion for new trial on the grounds of newly discovered evidence will not be granted unless all four of the following requirements are met: (1) the new evidence was discovered after trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal. *United States v. Barlow*, 693 F.2d 954, 966 (6th Cir. 1982). The government argues that this evidence was not material, but was merely cumulative impeachment evidence that would not likely produce an acquittal. Although not entirely clear, it seems that DeClercq was being investigated for attempted bribery at the time of defendant's trial, but had not yet been charged.